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Book Review: Criminal Law, by J. C. Smith and Brian Hogan

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BOOK REVIEWS

REVUE DES LIVRES

Criminal Law. By J. C. SMITH and BRIAN HOGAN. London: Butterworth & Co. (Publishers) Ltd. 1965. Pp. ixxix, 609. (\$17.50)

In the ensuing paragraphs, I intend to discuss English teaching materials in general rather than the particular merits of this book. A short examination of the text shows that the authors, who are two of the most capable commentators in the field, have a firm grasp of their subject and have provided an excellent guide to the black-letter law. I am fully aware of the excellent work done by Professor Smith in helping readers understand the cases reported in the *Criminal Law Review* and the imaginative editing carried out by Mr. Hogan in his capacity as an editor of *Medicine Science and the Law* and, more recently, of the *Criminal Law Review*. My criticism stems from the very fact that the authors should feel that there is a pedagogical justification for a new criminal law text book in this format. In the Preface, they explain that it will fill a gap between the old student standby, Kenny's *Outlines of Criminal Law*¹ and Glanville William's analytical and exhaustive *Criminal Law: The General Part*.² This is probably an accurate assessment of the present state of English legal education and teaching materials. If so, it is an unfortunate state of affairs. The authors also declare in the Preface that they "have endeavoured to provide the undergraduate with as complete an exposition of the substantive Criminal Law as he has to guide him in other fields of study". They have excluded procedure unless its discussion was necessitated by the discussion of criminal law. Evidence, "now commonly regarded as a worthy subject of academic study in its own right", is similarly avoided by the authors. They seem to have achieved their purposes in stating the substantive law if the fifty-six pages³ containing tables of statutes and cases is any guide. In addition to this vast use of bibliographical material, the text of the book covers almost six hundred pages. How is space used? The print is small and the footnotes are of a terse, bibliographical nature, at least compared with those in American texts. Even on the author's own terms, I find the relative weight given to topics a little per-

¹ (18th ed., by Turner, 1962).

² (2nd ed., 1961).

³ Pp. xxiii to lxxix.

plexing. For instance, only ten pages are assigned to a very cursory examination of "The Aims of the Criminal Law". This topic has been the subject of frequent and illuminating study in recent years.⁴ These discussions emanated from a dissatisfaction with the narrow view of criminal law which the book under review is perpetuating. This new approach gives consideration to "the nature of the limitations imposed upon the use of the criminal law for attaining its primary purpose of pervading values and principles of the general democratic social order in which it functions".⁵

The criminal law has been re-examined with a view to a planned use of the law to achieve social ends. The "doctrinal apparatus" of the relevant law must be perfected and this could only be done by relating it to other social processes. The drafting of the Model Penal Code was predicated on the assumption that the substantive criminal law was chaotic, encrusted with legal anachronisms and took little account of anything outside the narrow, and confining concepts of *mens rea*, *actus reus*, possession, "taking", "malice aforethought", and so on. The task of the American Law Institute did not end with a re-organization and rationalisation of the case law. The Chief Reporter of the Model Penal Code, Professor Herbert Wechsler, makes this very clear when he says:

. . . we shift our focus from the courts and their decisions to the legislatures and the task of legislation; and we concern ourselves with our subject as we think it should be viewed by those with ultimate responsibility for making law, not merely the subordinate responsibility for its interpretation or its application, . . .

A shift of this kind in our focus or perspective, works enormous change in our pre-occupations. For, our interest moves at once from the peripheral issues that give the largest trouble to the courts, working within existing systems, to the basic and intrinsic problems of the field, the questions as to ends and means that ought to be confronted in the building or appraisal or improvement of a system geared to serve its proper functions in the government of men. The target necessarily becomes to order all the problems in their right relation to each other; to explore their possible solutions, estimating, in so far as possible, both their advantages and cost; to marshal, articulate, and weigh values, knowledge, judgment, and experience that bear upon the choices to be made.

To say this is not to say that it is unimportant that we know and understand existing laws.⁶

⁴ E.g. Williams, *The Proper Scope and Function of the Criminal Law* (1958), 74 L.Q. Rev. 76; Michael and Wechsler, *Criminal Law and Its Administration* (1940), pp. 4-20; Cohen, *Moral Aspects of the Criminal Law* (1940), 49 Yale L.J. 987; Devlin, *The Enforcement of Morals* (1959); H.L.A. Hart, *Punishment and the Elimination of Responsibility* (1962); Allen, *The Borderland of Criminal Justice* (1964); Mewett, *The Proper Scope and Function of the Criminal Law* (1961), 3 Crim. L.Q. 371.

⁵ Paulsen and Kadish: *Criminal Law and Its Processes* (1962), p. 3.

⁶ Wechsler, *Legal Scholarship and Criminal Law* (1957), 9 J. Leg. Ed. 18, at p. 20.

The authors also discuss punishment in the most pedestrian way, dividing the various "theories" into nicely separated categories without establishing their relationship to the underlying policy of the criminal law or the implications of penology. This section is altogether too thin. Why not quote from some of the more thoughtful works of recent years on the inter-relationships of crime, corrections and sentencing?⁷

Similarly, Chapter 2 which discusses "The Definition of a Crime" is equally shallow, skimming across the surface of the subject ensuring that English law students will never get their feet wet.

Let me repeat that the authors are, of course, victims of a system rather than creators of it. My major problem in reading the text is that I find the orientation to be diametrically opposed to the approach which I think a law student should be encouraged to take. In Chapter 5 on Negligence, for instance, there is a three-page statement which is of limited value as it tries to state in a short space what should be developed in a more general discussion of responsibility. Admittedly the authors discuss negligence in relation to manslaughter⁸ but here their approach is to give chapter and verse of the cases in the text and to use one or two sentences to describe (with footnote citation) the arguments of men such as H. L. A. Hart, Glanville Williams and Jerome Hall who have thought deeply on the subject and have points of view which deserve elaboration and exposure to students.

What is the pedagogical aim of the English law teacher? Is he simply content with turning out successful LL.B. candidates who have temporary knowledge of literally thousands of cases illustrating some questionable principles? Alternatively, is he hoping to mould the mind of his law student, who is a potential legislator, law reformer as well as lawyer, so that he will take a constructively critical view of his laws so that he can improve them rather than blindly follow or glibly distinguish them in a legalistic manner? I submit that law teachers who believe that we should cram the students' heads with black-letter law in the vague hope that the students will give some later thought to "policy", the rationale of these laws, and so on, have the cart before the horse. How can one possibly be in a position to assess the efficacy of the present criminal law when one is so preoccupied with the more sophisticated absurdities of *mens rea*? While on this point, I must applaud Messrs. Smith and Hogan for not succumbing to the temptation of devoting numerous pages to the discussion of impossibility in attempt. They limit this topic (and related problems) to a mere ten pages.⁹ Coincidentally, this is precisely the space devoted to the

⁷ *E.g.* Crime and Corrections (1958), 23 Law & Contemporary Problems 583.

⁸ Pp. 223-229.

⁹ Pp. 152-161.

problem of insanity as a defence in the criminal law (including unfitness to plead). A further four pages describe the defence of diminished responsibility. In the discussion, the word "psychiatrist" is *never* used although one half page discusses "Proposals for Reform".¹⁰ In this section the critics of the *M'Naghten* Rules¹¹ are cited as believing that the Rules are based on "outdated psychological views".¹² The Royal Commission on Capital Punishment of 1953 is also referred to; the commissioners "thought that the question of responsibility is not primarily a matter of law or of medicine, but of morals and, therefore, most appropriately decided by a jury of ordinary men and women".¹³ While law students must understand that the insanity defence is subject to definition by law, surely they should have some inkling of the psychiatrist's viewpoint. Unlike many sections of the book, the discussion of insanity cites only one inconsequential law review article and no learned treatises. I also find it very surprising that the *Durham*¹⁴ rule is not mentioned. No one suggests that the rule laid down by the Federal Court of Appeals of the District of Columbia is perfect but it was the first serious judicial effort to provide an alternative to the *M'Naghten* Rule. Canadian readers will also be disappointed to find no reference to the excellent *McRuer Report*.¹⁵

Drunkenness, as it is commented upon in this book,¹⁶ is another area where the English law teacher is missing an excellent opportunity to discuss the implications of the current views on responsibility. The discussion is narrowly based on the leading cases of *Meade*¹⁷ and *Beard*.¹⁸ I am not suggesting that a text book on criminal law should include an exposition on the Jellinek studies of alcoholism¹⁹ or the psycho-social aspects of the problem; it should, however, stimulate a questioning attitude toward the present state of the defence, as well as a reassessment, in the context of drunkenness, of *mens rea* and the so-called presumption of intention. In this context, the omission of *Stones*,²⁰ *Hornbuckle*,²¹ *George*²² and *Boucher*²³ robs the discussion of a viability which these cases, particularly the first named, would have provided.

There is a singular lack of Commonwealth or United States materials. Why this parochial view? Outside the discussion of a few areas peculiar to the Commonwealth (such as excessive self-defence), few Australian or Canadian sources are cited. Why are

¹⁰ Pp. 107-108.

¹¹ *Daniel M'Naghten's Case* (1843), 10 Cl. & Fin. 200.

¹² P. 107.

¹³ Pp. 107-108.

¹⁴ *Durham v. United States* (1954), 214 F. 2d 862, 45 A.L.R. 2d 1430.

¹⁵ Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956).

¹⁶ Pp. 116-120.

¹⁷ [1909] 1 K.B. 895.

¹⁸ [1920] A.C. 479.

¹⁹ For instance, Haggard and Jellinek, *Alcohol Explored* (1942).

²⁰ (1955), 56 S.R. (N.S.W.) 25.

²¹ [1945] V.L.R. 281.

²² [1960] S.C.R. 871.

²³ (1962), 39 C.R. 242.

*Proudman v. Dayman*²⁴ and *O'Grady v. Sparling*²⁵ ignored? In a discussion of necessity why should students not be invited to consider the Case of the Speluncean Explorers?²⁶

What then is such a book as the one under review trying to achieve? I am frankly mystified. The comments I have made above make it perfectly clear that this is not meant to be a book which will stimulate the student to broaden his perspective of the phenomenon we call "crime". If this were so, we would find, for instance, greater attention paid to the theory of punishment, the concept of crime and criminal law, and to take particular examples, the rationale of conspiracy,²⁷ or the socio-economic aspects of property offences. This last omission is one of the most glaring. Surely Hall's *Theft, Law and Society*²⁸ is one of the most important contributions to this area of law (not sociology, economics, or psychology). Similarly, how could one ignore criminal or quasi-criminal "business practices", such as those which relate to white-collar crime, price-fixing, anti-trust or the duties and liabilities of company directors.

If the English law teacher is not planning to educate (in its purest sense) in the law, what is he aiming at, as exemplified by the law stated in this book? Is he planning to train the student to be a practitioner in the criminal courts? Presuming for the moment that such an aim is capable of achievement, which is doubtful, do the contents of this book, the substantive law "stated as at April 30, 1965", help him in this task? Can he, for instance, justify a mere twenty pages devoted to *actus reus* and *mens rea*, the very bases of criminal law, while more than four times that space is devoted to the atypical and relatively uncommon crimes of homicide?

The approach of this book is such that a student will complete his study with a super-saturated knowledge of the intricacies of the law relating to property offences (amounting to one quarter of the entire book) with all its legalistic warts. The student will, however, have no idea what will happen to a client who is illegally arrested, illegally searched, subjected to procedures which test his sobriety, whose communications are subjected to eavesdropping, who confesses under coercion, who wishes to be released on bail, to impugn evidence (on the basis of its relevancy to the rules of substantive law or otherwise) or to appeal. The student will have no knowledge of the operation of the legal aid system. The student will also be ignorant of the sentencing process, the use of presentence investigations, the types of punishments which may be

²⁴ (1941), 67 C.L.R. 536.

²⁵ [1960] S.C.R. 804.

²⁶ Fuller, *The Case of the Speluncean Explorers* (1949), 62 Harv. L. Rev. 61.

²⁷ Cf. the cursory discussion at p. 144 of the implications of *Shaw v. D.P.P.*, [1962] A.C. 220.

²⁸ (2nd ed., 1952).

imposed on the potential client. These matters could not, of course, be dealt with at length or in depth, but they deserve attention if the student is to be something more than a mere repository of narrow legal rules laid down by a positivistic judicial system and which are divorced from the disciplines which have a kindred interest in the community problem of crime and the treatment of the criminal as a deviate from the norms of society.

If the English teacher of criminal law does not intend to achieve these ends, an intensive study of the rules of the criminal law are likely to rob the law student of the greatest attractions of this field of law. The resulting course in substantive criminal law will be something less than a stimulating intellectual experience.

I cannot help comparing this type of book with the casebooks compiled in the United States. The most radical casebook is that of Goldstein, Donnelly and Schwartz²⁹; a short perusal of its table of contents will convince the reader of the truth of this statement. The editors discuss very little "substantive" law but examine the problems of criminal law and punishment from the viewpoint of a few illustrative cases. Such an approach would no doubt be too extreme for all but a select body of students in the rarified atmosphere of the Yale Law School or some similar institution. Paulsen and Kadish, *Criminal Law and Its Processes*³⁰ provides a more moderate teaching tool. This book embodies the best combination of theory and practice, policy and black-letter law, of ambiguous issues and pragmatic solutions.

I intend no disrespect to Messrs. Smith and Hogan when I suggest that a collection of the best academic writing, governmental and commission reports, perceptive and well-reasoned judgments, garnished with stimulating editorial comment and questions provides the best "text" book for the law student. I do not believe it is absolutely necessary, although no doubt desirable, for such a book to be used under the case method of teaching. It provides tools which are not available (or in short supply) in most law libraries and places before the student rules, concepts and arguments which he would not otherwise bother to consider or pursue.

GRAHAM E. PARKER *

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²⁹ *Criminal Law: Problems for decision in the promulgation, invocation and administration of a law of crimes* (1962). Professor Schwartz is a sociologist.

³⁰ See footnote 5, *supra*. See also Book Review (1964), 42 Can. Bar Rev. 350.

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